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In The

SUPREME COURT OF THE UNITED STATES

FRANK RICCI, *et al.*

Petitioners,

v.

JOHN DeSTEFANO, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS, THE CENTER FOR EQUAL OPPORTUNITY, AND THE AMERICAN CIVIL RIGHTS INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For the purposes of Title VII and the Equal Protection Clause, does a government employer's refusal to follow an established procedure for the hiring of a person because of that person's race constitute intentional racial discrimination if the refusal was based upon the employer's various concerns about the racial balance among the successful applicants?

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Center for Equal Opportunity and the American Civil Rights Institute are nonprofit research, education, and public advocacy organizations. These *amici* devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society, and publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. These *amici* also have participated as

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[1] Blanket consent letters have been filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

SUMMARY OF ARGUMENT

The court below concluded that the decision not to hire the petitioners (the "firefighters") was race-motivated but not "intentional discrimination." Consequently, it is contrary to every decision this Court ever has issued concerning the meaning of that phrase.

Specifically, the Second Circuit followed a rule declaring that any effort to avoid the disparate impact of a selection device that does not use explicit racial classifications is *never* intentional discrimination. Thus, under this rule, even where the employer has no real fear of any liability – because, for example, its selection criteria is obviously job-related (such as language fluency for a translator) – it may engage in flagrantly race-motivated conduct to "remedy" any disparate impact, provided it does not use explicit racial classifications. This interpretation of both Title VII and the Equal Protection Clause is just wrong. The primary purpose of both Title VII and the Equal Protection Clause is to prevent intentional discrimination, *i.e.*, the consideration of a prohibited factor in an employment or other decision. There can be no doubt that that is what happened here, and the judgment of the court below must be reversed.

ARGUMENT

I. THE COURT BELOW'S CONCLUSION THAT THE DEFENDANTS DID NOT ENGAGE IN INTENTIONAL DISCRIMINATION IS WRONG

Section 703(a)(1) of Title VII states:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin.

There can be no dispute that the defendants refused to hire (or promote) plaintiffs. The only question is whether, with all facts and inferences favoring the firefighters, that refusal was because of any individual's race. It was.

Accordingly, the firefighters met their summary judgment burden of showing that race was a "motivating factor" for the decision not to hire them (42 U.S.C. § 2000e-2(m)), and that defendants engaged in intentional discrimination invoking strict scrutiny under the Equal Protection Clause.

A. Defendants Were Motivated By Race

The district court opinion in this case whose reasoning was adopted by the court below identified a substantial number of purported different race-connected motivations for the defendants' decision not to hire plaintiffs. *E.g.*, *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008):

> Plaintiffs' evidence -- and defendants' own arguments -- show that the City's reasons for advocating non-certification were related to the racial distribution of the results. As the transcripts show, a number of witnesses at the CSB [New Haven Civil Service Board] hearings, including Kimber, mentioned "diversity" as a compelling goal of the promotional process. Ude, Marcano, and Burgett specifically urged the CSB not to certify the results because, given the number of vacancies at that time, no African-Americans would be eligible for promotion to either Lieutenant or Captain, and no Latinos would be eligible for promotion to Captain. They believed this to be an undesirable outcome that could subject the City to Title VII litigation by minority firefighters, and the City's leadership to political consequences.

> Had the tests not yielded what defendants perceived as racially disparate results, defendants would not have advocated rejecting the tests, and plaintiffs would have had an opportunity to be promoted.

Id. at 162:

> [Defendants] acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.

As the firefighters' brief shows, these are euphemistic descriptions of defendants' concerns, with little evidence to support them – especially on defendants' summary judgment motion, when the evidence is considered with all disputes and inferences favoring the firefighters. But even these euphemistic descriptions demonstrate that the firefighters met their summary judgment

burden of proving a genuine issue of material fact on whether the refusal to hire them was because of their race or color.

In general, "intentional discrimination" on the basis of race is the consideration of race in making a decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality op.) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."); *id.* at 240 (plurality op.) ("We take these words to mean that gender must be irrelevant to employment decisions. . . ."); *id.* at 242 (plurality op.) ("We conclude . . . that Congress meant to obligate [a Title VII plaintiff] to prove that the employer relied upon sex-based considerations in coming to its decision.").

A consideration does not avoid falling under the rubric of being "race-based" simply because the employer believes that there are non-racial consequences that would flow from hiring persons of a particular race – the loss of business from racists, co-employee dissatisfaction or departures, political consequences, etc. Title VII does not permit an employer to rely upon discriminatory "customer preference" as a legitimate business justification. *E.g.*, *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (sex was not a bona fide occupational qualification for flight attendant notwithstanding lower court's

finding that passengers "overwhelmingly preferred to be served by female stewardesses").[2] Neither does the Constitution. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (state court violated the Equal Protection Clause when, in its analysis of the best interests of the child, it weighed the fact that child's mother was in a mixed-race marriage; "The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.").

Nor does it matter that the employer did not hire anyone, *i.e.*, that it superficially treated people the same. *Ricci*, 554 F. Supp. 2d at 161. The question is not whether those who had achieved different levels of success on the civil service tests were treated identically; it is whether defendants treated plaintiffs the same as defendants would have treated hypothetical African American candidates had they done just as well as plaintiffs had on the exams.

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[2] *Diaz* actually considered whether sex was a bona fide occupational qualification. But that only demonstrates that there could be no dispute that "customer preference" was not a "non-discriminatory" reason for the defendants' policies of making employment decisions influenced by an employee's sex. The BFOQ inquiry is made only after a determination that the defendant has engaged in intentional discrimination.

Here, defendants' motivations were racial. Defendants were concerned that hiring plaintiffs would "undermine their goal of diversity in the Fire Department"; "would fail to develop managerial role models for aspiring firefighters"; and "would subject the City to public criticism." *Ricci v. DeStefano*, 554 F. Supp. 2d at 162. Each of these concerns is directly related to most of the plaintiffs' race, and thus constitute racial considerations that would support a finding of intentional race discrimination.

Indeed, the first two of these rationales have been considered as possible compelling governmental interests under the Equal Protection Clause (albeit in the educational context only). *Grutter v. Bollinger*, 539 U.S. 306 (2003) (diversity in higher education was a compelling governmental interest); *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 276 (1986) (plurality op.) (rejecting role model theory as compelling governmental interest for race-conscious school teacher layoffs). The important point here is that questions like "strict scrutiny" and "compelling governmental interest" are only reached *as a justification for intentional discrimination*. *E.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government."). And the third rationale (avoiding "public criticism") is nearly indistinguishable from the "customer preference"

rationale discussed above.[3]

The courts below also identified avoiding Title VII liability as a possible motivation. The firefighters here argue that they raised a genuine issue of material fact as to whether that purported motivation was a pretext. But even if it were not a pretext, and even if "avoiding Title VII liability" were actually a non-discriminatory motivation, it would still have been only one of several race-based motivations. That is, its existence would only go to damages, not liability. 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice").

B. The Rule That Some Race-Motivated Refusals To Hire Are Not Intentional Discrimination Is Incoherent And Wrong

The courts below held that a racially-motivated refusal to hire does not constitute

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[3] Similarly, the fact that a particular race-motivated decision might be facially race-neutral, so all-important to the courts below, *might* go to whether the decision was narrowly-tailored under the Equal Protection Clause. *Grutter*, 539 U.S. at 339. But, again, narrow-tailoring analysis is part of the strict scrutiny given to all forms of intentional discrimination.

"intentional discrimination" in violation of Section 703 or the Equal Protection Clause. *Ricci*, 554 F. Supp. 2d at 160 ("Defendants' motivation to avoid making promotions based on a test with a racially disparate impact, *even in a political context*, does not, *as a matter of law*, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim." (emphasis added)); *id.* at 162 (rejecting Equal Protection Clause claim because "[n]one of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the . . . exams"). These rulings are wrong.

In reaching its conclusion, the district court applied the following rule: "'nothing . . . precludes the use of race-neutral means to improve racial and gender representation . . . . [T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.'" *Ricci*, 554 F. Supp. 2d at 158-59 (*quoting Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999)). The gist of the district court's opinion, then, was that the firefighters' evidence of defendants' desire to avoid a substantially white promotion cadre for political or other reasons simply did not prove intentional discrimination in violation of either Title VII or the Equal Protection Clause. In affirming the district court's judgment based upon "the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below," *Ricci v. DeStefano*, 530

F.3d 87 (2d Cir. 2008), the circuit court adopted that reasoning.

By "race neutral" or "facially neutral" acts, the courts below mean *any* acts that do not create explicit racial classifications. (Race must obviously be a motivation if one is trying to remedy a racially disparate impact.) *E.g.*, *Ricci v. DeStefano*, 530 F.3d 88, 90 (2d Cir. 2008) (Parker, J., concurring in the denial of *en banc* rehearing) (referring to "facially neutral, albeit race-conscious" actions). That is, the courts below distinguished between action that uses race explicitly, and facially-neutral but racially-motivated conduct in certain contexts. This Court has never made any such distinction. Nor should it. It makes little sense to treat two identical employment actions differently depending upon whether the employer happened to keep its racial motivation a secret or not. But, under the Second Circuit's rule, if an employer announces that it will hire those from a civil service list with list numbers divisible by five, and the (unannounced) reason it is doing so is that such a procedures will result in three whites and two non-whites being hired, that is a "facially neutral but race-motivated" remedy to disparate impact. If it announces that it will hire the top three scoring whites and the top two scoring non-whites, and does so, then it has used an explicit racial classification and has engaged in intentional discrimination. Nothing in this Court's opinions has suggested that such a distinction is a reasonable interpretation of Title VII or the Equal

Protection Clause.

If taken seriously, the analysis of the courts below would mean that colleges and professional schools would need worry no longer about inconvenient precedents like *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Instead of adding points for minority applicants (as in *Gratz*) or creating a special admissions program for them (as in *Bakke*), those institutions could simply add an irrelevant admissions criterion that they believed minorities would do well in – say the 50-yard backstroke. Since that would be a "facially neutral" albeit racially-motivated criteria, and it would diminish the disparate impact resulting from the use of standardized admission tests (*see* 28 C.F.R. § 42.104(b)(2)), it would not even constitute intentional discrimination or violate the Equal Protection Clause (which requires intent, *Washington v. Davis*, 426 U.S. 229 (1976)).

The fact that the Second Circuit limits its idiosyncratic definition of "intentional discrimination" to situations where the employer is addressing the results of a selection device with disparate impact does not make it coherent. To the contrary. If an employer takes "facially neutral" acts to manipulate the racial results of an employment process in *any other context* -- if, for example, the selection device does not have disparate impact but the employer is still

dissatisfied with the racial results for public relations or other reasons -- then those "facially neutral" acts are deemed a form of intentional discrimination.

C. The Courts Below Misconstrued The Elements of "Intentional Discrimination"

The courts below misconstrued the "intent" requirement of the Equal Protection Clause and Title VII because they equated it with either (a) an express racial classification or (b) some kind of malevolent motivation against whites. Just after listing the defendants' various motives – including the goal of "diversity in the Fire Department" and avoiding "public criticism" – the district court held that "*[n]one* of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the Lieutenant and Captain exams." *Ricci*, 554 F. Supp. 2d at 162 (emphasis added). This use of "animus" is contrary to the language of the statute, and the interpretation this Court has given that word in Title VII and other civil rights laws.

First, Section 703(a) does not require that an employer act "'because of' animus against" someone based upon race; it requires only that the employer have acted "because of" race. Animus has been used occasionally by this Court to describe a motivation that is the same as

intentional discrimination or disparate treatment. But it is not mentioned in the statute, and is certainly not an added requirement beyond what is explicitly required by Section 703(m).

In any event, the lower courts appear to be using "animus" as a synonym for hatred or dislike, and there is nothing in Title VII or Equal Protection jurisprudence, or that of other civil rights laws, that would support such a requirement. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70 (1993), this Court held:

> We do not think that the "animus" requirement [in Section 1985(3)] can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex* – for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law. (emphasis in original)

Cf. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)

(policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII; "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668 (1987) (Section 1981 liability found against unions for failing to pursue claims of racial discrimination on the part of their members even though "there was no suggestion below that the [u]nions held any racial animus against or denigrated blacks generally"); *id.* at 669 (affirming lower court finding that a union is liable under Section 1981 "regardless of whether . . . its leaders were favorably disposed toward minorities"). *Cf. Bakke*, 438 U.S. at 307 (opinion of Powell, J.):

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

II. TITLE VII SHOULD NOT BE INTERPRETED TO PERMIT REMOTE POSSIBILITIES OF LIABILITY FOR DISPARATE IMPACT TO EXCUSE A VIOLATION OF ITS CORE PROVISION PRECLUDING DISPARATE TREATMENT

The primary purpose of Title VII is to prohibit intentional discrimination. The prohibition against "disparate impact" discrimination should not be used to excuse intentional discrimination.

Even in the initial case adopting the "disparate impact" paradigm, this Court made clear that a "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Thus, this Court has described the "disparate impact" prohibition as a prophylactic designed to attack Title VII's core concern, intentional discrimination. *E.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

This Court, and various of its Justices, has expressed concerns that an overly-permissive interpretation of the disparate impact model would

lead to "quotas," a form of intentional discrimination. *E.g.*, *id.* at 992 (plurality op.) ("We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures . . . . Congress has specifically provided that employers are *not* required to avoid 'disparate impact' as such." (emphasis in original) (*citing* 42 U.S.C. § 2000e-2(j))); *id.* at 993 (plurality op.) ("If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. . . . Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . ."); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989) (permitting a prima facie case of disparate impact to be established based solely on a discrepancy between proportion of minorities in employer's two different job categories "cannot be squared . . . with the goals behind the statute. . . . The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII."); *id.* (permitting a prima facie case to be so established "would 'leave the employer little choice . . . but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.'" (*quoting Albemarle Paper Co. v. Moody*, 422 U.S.

405, 449 (1975) (Blackmun, J., concurring in judgment))). This Court's reluctance to allow the disparate impact theory of liability to undermine the ban on disparate treatment shows the superior place the latter prohibition has in the statute.

That prohibiting intentional discrimination is the core goal of Title VII can be seen further from various parts of its text. First, as the above-cited cases note, Section 703(j) makes clear that any prohibition on disparate impact does *not* require an employer to engage in racial balancing (which would, of course, be a form of disparate treatment). 42 U.S.C. § 2000e-2(j). The safe-harbor for professionally-developed, job-related exams (42 U.S.C. § 2000e-2(h)) further demonstrates that the Congress that passed Title VII was not trying to attack racial imbalance. Section 707(a) grants the Attorney General the right to bring a lawsuit against those who have committed a "pattern or practice" of conduct "*intended* to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a) (emphasis added).

Provisions passed in the Civil Rights Act of 1991 further demonstrates this point. When Congress permitted plaintiffs to recover compensatory damages for discrimination, in the Civil Rights Act of 1991, it limited that remedy to instances of intentional discrimination. 42 U.S.C. § 1981a(1) (excluding "an employment practice that is unlawful because of its disparate impact"

from scope of the provision providing compensatory damages). Section 703(l) prohibits a particular kind of intentional discrimination – the adjustment of test results on the basis of race – that Congress feared was being used by some employers to remedy the disparate impact of such exams (and which is implicated in this case). 42 U.S.C. § 2000e-2(l). Finally, Section 703(m) creates liability whenever a prohibited consideration is a "motivating factor" in an employment decision, even if the employer would have done precisely the same thing in the absence of the improper factor. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

Not only does Title VII's text clearly set its primary goal as eliminating intentional discrimination, but it also sets the elimination of intentional *racial* discrimination as the highest priority. Thus, while "business necessity" can provide a defense to a claim of disparate impact discrimination (but *not* intentional discrimination, *see* Section 703(k)(2)), and a "bona fide occupational qualification" showing can provide a defense to intentional sex, religion, or national origin discrimination (Section 703(e)(1)), *neither* of those defenses is available in a case of intentional racial discrimination.

Given the primacy of the prohibition against intentional employment discrimination in Title VII, the defense that an employer was trying to avoid disparate impact liability must be confined

so that it does not erode the statute's central purpose – much less the central purpose of other statutes, like 42 U.S.C. § 1981, which prohibit only intentional discrimination. In this regard, the motivation of "avoiding disparate impact liability" cannot be viewed as just another "non-discriminatory" motive for the refusal to hire, with the absence of evidence for the non-discriminatory motive going solely to its credibility and not to its legal sufficiency, when (as is true here) "avoiding liability" is inextricably bound with the race of the applicants.

Thus, even if "avoiding disparate impact liability" were the sole motivation for defendants' decision here – and, as shown in Part I, the courts below found a variety of different motives having nothing to do with avoiding liability – it would not be sufficient for defendants simply to show that they had a good faith belief that they *might* be sued, or even that they *might* be liable. To prevent such a defense from eroding Title VII's core prohibition against intentional discrimination, defendants should be required to show a strong evidentiary basis for such a belief, much as they have to do under the Equal Protection Clause.

An analogy can be drawn to race-conscious affirmative action plans, with which an "avoiding liability" defense has much in common. *United Steelworkers of America v. Weber*, 443 U.S. 193, 209 n.9 (1979) (Court declines to reach company and union's alternative argument that "their plan

was justified because they feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan"). In *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616 (1987), this Court placed the adoption of a sex-conscious affirmative action plan within the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework. *Johnson*, 480 U.S. at 626-27. Thus, upon a plaintiff's establishing a prima facie case that a prohibited factor was taken in to account in an employment decision, "the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale." *Id.* at 626.[4]

Yet, despite the reference to the *McDonnell-*

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[4] This Court's adoption of the *McDonnell-Douglas* framework in *Johnson*, and specifically its characterization of race-conscious or sex-conscious affirmative action plans as "nondiscriminatory rationales" in that framework, has led to some logical difficulties. Although this Court has held that *McDonnell-Douglas* is inapplicable in cases in which there is direct evidence of discrimination, courts have nonetheless deemed "affirmative action" plans to constitute direct evidence of discrimination. *See Bass v. Bd. Of County Commissioner, Orange County*, 256 F.3d 1095, 1111 n.7 (11th Cir. 2001) (rejecting argument that *Johnson* requires affirmative action plans to be considered only as circumstantial evidence of discrimination, and treating such plans as "direct evidence" of discrimination if invalid). For this reason, *amici* believe that the characterization of a race-conscious or sex-conscious affirmative action plan as a "nondiscriminatory rationale" was mistaken.

Douglas framework, no lower courts have adopted the position that the employer need only show a good-faith belief that it had adopted a valid affirmative action plan (regardless of whether it meets the evidentiary requirements in *Johnson*). To the contrary, in determining whether the "employer's justification is pretextual and the plan is invalid," *Johnson*, 480 U.S. at 626, courts will look at whether the evidence shows a "manifest imbalance" in the job category in question, and no such "manifest imbalance" can be found where, for example, the employer "simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures." *Id.* at 636. *See Hill v. Ross*, 183 F.3d 586, 590 (7th Cir. 1999) ("Employers may not shed their responsibilities under Title VII . . . by intoning affirmative action."); *Maitland v. University of Minnesota*, 155 F.3d 1013, 1017 (8th Cir. 1999) (dispute of fact over whether salary regression study allegedly showing disparity in women faculty's salaries properly considered important variables precluded summary judgment on male faculty member's Title VII challenge to university's distribution of three million dollars in salary increases to a class of women); *Smith v. Virginia Commonwealth University*, 84 F.3d 672, 676-77 (4th Cir. 1996) (similar); *Hammond v. Barry*, 826 F.2d 73, 78 (D.C. Cir. 1987) (rejecting affirmative action plan for D.C. Fire Department based upon the demographics of the District only where Fire Department hired firefighters from

surrounding suburbs as well); *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1039-40 (7th Cir. 1987) (rejecting affirmative action plan for firefighters and police in South Bend that was based on general population statistics instead of the relevant labor pool). Similarly, courts must examine, as a factual matter, whether the manifest imbalance occurred in a "traditionally segregated job categor[y]" (*Johnson*, 480 U.S. at 632) and whether the plan "trammel[s] the rights" of those not benefitting from the plan (*id.* at 637).

Any "avoiding disparate impact liability" defense recognized here should be similarly limited. That is, to be deemed a "non-discriminatory rationale," there must be more than just an employer's good-faith belief that liability is possible, but strong evidence that it is so. Specifically, there should be evidence that there is a statistical disparity caused by an identifiable employer practice that is likely not defensible as job-related. Anything less would erode Title VII's core prohibition against intentional discrimination.

III. DEFENDANTS' CLAIM THAT THEY WERE CONCERNED ABOUT LIABILITY UNDER SECTION 703(K)'S "ALTERNATIVE EMPLOYMENT PRACTICE" PROVISION LACKS CREDIBILITY GIVEN THE LIMITS OF THAT SECTION

Defendants claim that they were concerned about possible lawsuits claiming that some unknown alternative employment practice rendered them liable under Title VII. This claim lacks credibility given the limited nature of the relevant provision under Section 703(k).

Section 703(k)(1)(A)(ii) states:

> An unlawful employment practice based on disparate impact is established under this subchapter *only if* - . . .
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice *and the respondent refuses to adopt such alternative employment practice*.

42 U.S.C. § 2000e-2(k)(1)(A)(ii) (emphasis added).[5]

Plaintiffs attempting to prove a claim of discrimination through this method must show that there was an alternative selection device that was equally effective in terms of costs and other burdens in meeting the employer's legitimate business goals. *Watson*, 487 U.S. at 998 (O'Connor, J., concurring). Thus, under Section 703(k)(1), an employer is not liable for failing to adopt an alternative employment practice *unless and until* (1) the alternative practice has been proven to be one that is equally effective in meeting the employer's legitimate business goals *and* (2) the employer, *after having been presented*

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[5] Subparagraph C, to which subparagraph A(ii) refers, states that the demonstration alluded to in A(ii) "shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" 42 U.S.C. § 2000e-2(k)(1)(C). Although *Wards Cove Packing* was decided on June 5, 1989, its two paragraphs on the topic of alternative employment practices (*Wards Cove*, 490 U.S. at 660-61) did not purport to change the law that existed the day before on "alternative employment practices" – indeed, what it had to say on the subject was likely *dicta*, since the holding of the case was that the petitioners had not demonstrated a *prima facie* case of disparate impact. *Id.* at 650-53. Accordingly, it is unclear what meaning should be attributed to these opaque and self-referencing provisions. In any event, as shown in the text, the key provision for purposes here is separate from the showing needed to demonstrate that an alternative employment practice meets the requirements of subparagraph C.

with this evidence, refuses to adopt the alternative employment practice.

What this means, of course, is that, in the usual case, the remedy against an employer for violating Section 703(k)(1)(A)(ii) will be injunctive relief. While it is possible that the "equal effectiveness" showing was made years earlier, chances are that it is not made until trial. (That certainly would have been the case for any hypothetical challenge to the promotion procedures here.) An employer cannot "refuse to adopt" an equally effective practice until after it has been demonstrated to be "equally effective." And an employer cannot be held liable for damages or other compensatory remedies for conduct it engaged in *prior to* the conduct (here, the refusal to adopt) that rendered it liable.

Moreover, courts must take into account an employer's legitimate need for *timely* appointments to needed positions. An alternative employment practice was not "equally effective" for appointments made *in the past* if it would have taken another year or more to implement when compared to the selection device that the employer was ready to use. Given the care with which New Haven developed the civil service tests in question, detailed in the firefighters' brief, that certainly would have been the case here.

For these reasons, the provisions of Section 703(k)(1) can be used to enjoin employers from

using certain practices in the future, but can almost never be used to impose liability for appointments made in the past. It could not have been used to impose liability for appointment of the firefighters in accordance with Connecticut civil service law. Thus, the defendants' claim that they could have been liable under Section 703(k)(1) had they promoted the firefighters in accordance with Connecticut civil service law lacks credibility.

IV. THE EXISTENCE OF SELECTION DEVICES WITH DISPARATE IMPACT IS NOT, BY ITSELF, A COMPELLING GOVERNMENTAL INTEREST SUFFICIENT TO JUSTIFY THE USE OF RACE

Finally, with respect to the Equal Protection Clause, all race-conscious decision-making is subject to strict scrutiny, requiring the use of narrowly-tailored means to achieve a compelling governmental interest. The mere existence of a selection device with disparate impact does not create a compelling governmental interest sufficient to invoke racial decision-making.

This Court has said that the use of racial preferences should be limited to extreme cases where they are needed to break down long-term policies of exclusion. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down

patterns of *deliberate exclusion.*" (emphasis added)). Although this Court in *Croson* noted that the evidence before the City of Richmond did not even constitute a *prima facie* case of a statutory or constitutional violation (*id.* at 500), it never held that evidence that did constitute a "*prima facie* case" would be sufficient, by itself, to constitute a compelling governmental interest. (If this Court had said that the evidence before the City of Richmond did not even constitute "flimsy evidence" of discrimination, it would hardly follow that flimsy evidence was sufficient to constitute a compelling governmental interest.)

Indeed, if the existence of selection criteria with disparate impact were sufficient, it seemed fairly clear that the various capital and other requirements of the City of Richmond's contracting program likely met that standard. *Id.* at 507 ("Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral.").

Selection devices with disparate impact are pervasive in our society. Requiring Chinese translators to be fluent in Chinese probably has a disparate impact against groups other than Chinese-Americans. If that were all that were required to constitute a compelling state interest, a state employer could provide preferences to whites, blacks, and Hispanics. Similarly, if a public school requires its teachers to have a certain college

degree, and that requirement eliminates more minorities than whites, the public school could engage in race-conscious hiring favoring the disparately-impacted minorities. In short, racial preferences, rather than being rare and limited in scope, would be pervasive.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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